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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 257

STATE OF FLORIDA EX REL. WILLIAM H. McKEIGHAN,

Appellant,

vs.

JIMMY SULLIVAN, SHERIFF OF DADE COUNTY, FLORIDA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

EUGENE F. BLACK,
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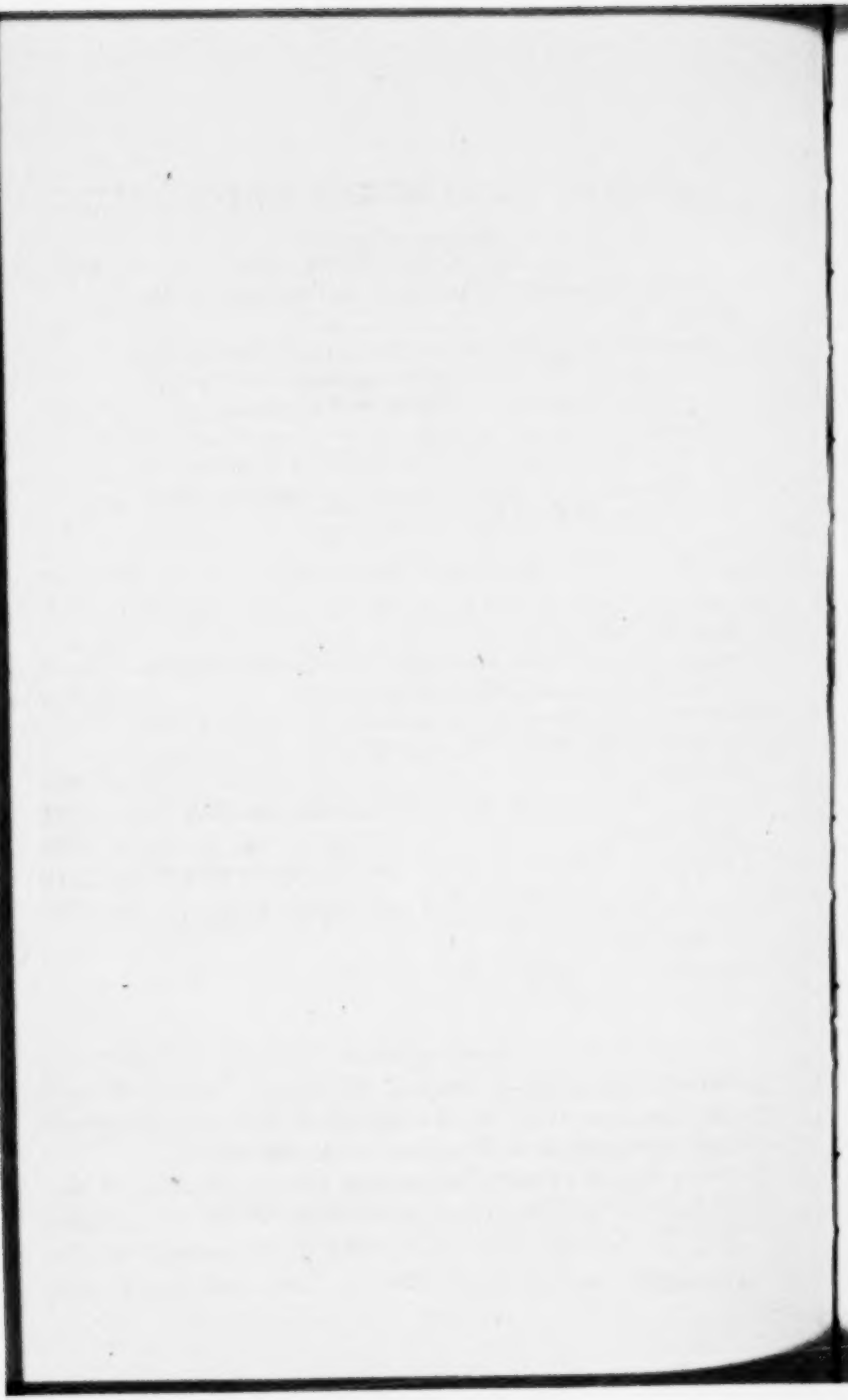

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 257

STATE OF FLORIDA ex rel. WILLIAM H. McKEIGHAN,

Appellant,

vs.

JIMMY SULLIVAN, as Sheriff of Dade County, Florida,

Appellee.

STATEMENT OF APPELLEE AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT IN QUESTION AS ASSERTED BY THE APPELLANT AND APPELLEE'S MOTION TO DISMISS THE APPEAL.

Appellee herein sets forth his statement disclosing the matters and grounds making against the jurisdiction of this Court asserted by the appellant and incorporates in such statement its motion to dismiss the appeal.

The appellant seeks to ground the jurisdiction of this Court upon the provisions of Section 237 of the Judicial Code, as amended (28 U. S. C. 344), on the ground that the validity of certain State Statutes have been drawn into

question as repugnant to the Constitution and to the laws of the United States and that the decision of the Supreme Court of Florida was in favor of the validity of those Statutes.

The Statutes, the constitutionality of which is alleged by the appellant as having been drawn into question, are Section 941.03, Florida Statutes 1941, which reads as follows:

> "No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under § 941.06, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by an authenticated copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of a warrant supported by an affidavit made before a committing magistrate of the demanding state; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand."

and Section 505 of the Penal Code of the State of Michigan which reads as follows:

> "Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than five years or by

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a fine of not more than two thousand five hundred dollars."

The appellant also asserted under his jurisdictional statement that the validity of the rendition warrant, issued by the Governor of the State of Florida, pursuant to the rendition requisition of the Governor of the State of Michigan, was drawn into question as being in conflict with the Federal Statute governing extradition (18 U. S. C. 662).

It should be noted that the Supreme Court of Florida wrote no opinion in the cause but simply affirmed the judgment of the lower Court without opinion; and that on the petition for rehearing it merely denied the petition for rehearing without opinion.

(a) Grounds Making Against the Jurisdiction of This Court as Asserted by the Appellant and in Support of Appellee's Motion to Dismiss Appeal.

The grounds making against the jurisdiction of this Court as asserted by the appellant and in support of appellee's Motion to Dismiss the appeal are:

1. That while the constitutionality of Section 505 of the Penal Code of the State of Michigan, *supra,* was raised before the lower Court (Circuit Court in and for Dade County, Florida) and the Supreme Court of the State of Florida, yet it does not appear that a decision on the validity of Section 505 of the Penal Code of the State of Michigan was necessary for the determination of the cause nor that the constitutionality of Section 505 of the Penal Code of the State of Michigan was actually decided nor does it appear that the judgment could not have been given without deciding it.

2. That the constitutionality of Section 941.03, Florida Statutes 1941, was not raised or drawn into question by the

appellant except on its Petition for Rehearing before the Supreme Court of the State of Florida, which petition was denied without opinion.

3. That the alleged conflict of the executive warrant issued by the Governor of the State of Florida and the Federal Extradition Statute was not raised or drawn into question except upon Petition for Rehearing filed before the Supreme Court of the State of Florida, which Petition for Rehearing was denied without opinion.

(b) Statement of Law in Support of Grounds Against the Jurisdiction of This Court as Asserted by the Appellant and in Support of Appellee's Motion to Dismiss the Appeal.

1. Section 505 of the Penal Code of the State of Michigan, *supra,* was the statute upon which the information charging the crime against the appellant was predicated. This information (typewritten transcript 95-102), together with the supporting affidavits, was the basis for the rendition requisition issued by the Governor of the State of Michigan and upon which the rendition warrant was issued by the Governor of the State of Florida. The record, while it shows that the constitutionality of this Section, was raised, *yet it does not appear from the record that the Circuit Court in and for Dade County, Florida or the Supreme Court of Florida passed on the validity of the statute* nor does it appear that a decision on the validity of such statute was necessary for the determination of the cause nor does it appear that the judgment could not have been given without deciding the validity of the statute.

It was urged by the appellee before the Supreme Court of Florida (appellee's Brief 29-30) that the Supreme Court of Florida should not pass upon the constitutionality of Section 505 of the Penal Code of the State of Michigan,

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supra, but should leave this matter to the Supreme Court of Michigan. This Court, in the case of *Pearce* v. *State of Texas et al.,* 155 U. S. 311, 39 L. Ed. 164, 15 Sup. Ct. Rep. 116, stated that the Court of Criminal Appeals of the State of Texas did not err in refusing to pass upon the constitutionality of a statute of the State of Alabama under which a fugitive from justice from the State of Alabama was indicted, and held:

> "• • • What the state court did was to leave the question as to whether the statute was in violation of the constitution of the United States, and the indictments insufficient accordingly, to the demanding state. Its action in that regard simply remitted to the courts of Alabama the duty of protecting the accused in the enjoyment of his constitutional rights, and if any of those rights should be denied him, which is not to be presumed, he could then seek his remedy in this court."

This Court further held in the case of *Henry* v. *Henkel,* 235 U. S. 219, 228, 59 L. Ed. 203, 35 Sup. Ct. Rep. 54, 57:

> "The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, *or the unconstitutionality of the statute, state or federal, on which the charge was based.* In some of the cases the applicants have advanced the same arguments that are here pressed, including that of the hardship of being taken to a distant state for trial upon an indictment alleged to be void. But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court • • • has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is

it intended as a substitute for the functions of the trial court. Manifestly this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based." (Italics supplied.)

The above views have been succinctly set forth as follows:

"* * * No question as to the constitutionality of a statute under which a charge is made in the demanding state may be raised in a habeas corpus proceeding brought to obtain a prisoner's discharge from custody under a warrant for his extradition to such state for trial. * * *"

25 Am. Jur. 195.

It therefore appears:

(a) That the Supreme Court of Florida did not affirmatively pass on the constitutionality of Section 505 of the Penal Code of the State of Michigan, *supra;*

(b) That a determination of the constitutionality of such Section was not necessary to a final adjudication of the cause; and

(c) That the Supreme Court of Florida should not have passed upon the constitutionality of such Section.

This Court has held on innumerable occasions:

"In order to give this court jurisdiction of a writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively that a Federal question was presented for decision, that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment rendered could not have been given without deciding it."

First National Bank of Easterville, Iowa, et al., v. *City Council of Easterville, et al.*, 215 U. S. 341, 54 L. Ed. 223, 30 Sup. Ct. Rep. 152.

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To the same effect see *Western Union Telegraph Company* v. *Sid Wilson*, 213 U. S. 52, 53 L. Ed. 693, 29 Sup. Ct. Rep. 403, 404; *Edward Bonner et ux.* v. *Henry P. Gorman et al.*, 213 U. S. 86, 53 L. Ed. 709, 29 Sup. Ct. Rep. 483; *Chesapeake & Ohio Railway Company* v. *J. W. McDonald*, 214 U. S. 191, 53 L. Ed. 963, 29 Sup. Ct. Rep. 546.

(2) The constitutionality of Section 941.03, Florida Statutes 1941, and the validity of the rendition warrant issued by the Governor of the State of Florida herein challenged by the appellant were not raised except upon the Petition for Rehearing before the Supreme Court of the State of Florida.

Under Rule 25 of the Rules of the Supreme Court of Florida, which rule provides for the filing of a petition for rehearing, paragraph (b) states:

> "(b) The petition shall not assume any new ground or position from that taken in the original argument or briefs upon which the cause was submitted, and must set forth concisely the omissions, oversight, causes or grounds on which it is based, and must point out specifically in what respect the original opinion and decision is deemed to be erroneous in some material matter of law or fact."

The Petition for Rehearing was denied without an opinion, by the Supreme Court of the State of Florida, and it is readily apparent by the reading of the above and foregoing rule that the petition filed by the appellant was in direct violation of that rule. This Court has held on innumerable occasions that nothing is better settled than that it is too late to raise a Federal question for the first time in a Petition for Rehearing, after the final judgment of the State Court of last resort. We shall not unduly burden this Court with citations from the numerous authorities but shall, for the sake of brevity, quote only from the case of

Samuel McMillen et al. v. *Ferrum Mining Company*, 197 U. S. 343, 49 L. Ed. 784, 25 Sup. Ct. Rep. 533, 535, in which this Court held:

> "It is sufficient for the purposes of this case to say that no Federal question appears to have been raised until the petition was filed for a rehearing. This was obviously too late, unless, at least, the court grants the rehearing and then proceeds to consider the question. Mallett *v.* North Carolina, 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. Ct. Rep. 730; Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 856, 13 Sup. Ct. Rep. 934; Miller *v.* Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874"

It is therefore respectfully submitted that this Court should refuse to take jurisdiction of this cause and should grant appellee's Motion to Dismiss the appeal.

Respectfully submitted,

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